

Supreme Court, U. S.

FILED

JUN 20 1977

IN THE MICHAEL RODAK, JR., CLERK

SUPREME COURT OF ~~THE UNITED STATES~~

October Term, 1976

No. **77-197**

DONALD SCHANBARGER,

Petitioner,

V

MARINE MIDLAND BANK-CENTRAL (Executor of
Harriet Hendry Estate),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT, APPELLATE
DIVISION OF THE FOURTH DEPARTMENT

12/10/76

DONALD SCHANBARGER

Salem, New York 12865

June 1, 1977

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October Term, 1976

DONALD SCHANBARGER,
Petitioner,

MARINE MIDLAND BANK-CENTRAL (Executor of
Harriet Hendry Estate),
Respondent.

The petitioner Donald Schanbarger respectfully prays that a writ of certiorari issue to review the Order of the New York State Supreme Court, Appellate Division of the Fourth Department entered in its clerk's office on December 10, 1976.

OPINION BELOW

Opinion of Herkimer County Surrogate's Court of New York State appears in the Appendix pp 1 - 10 hereto. There is no opinion by the Appellate Division of the New York State Supreme Court.

JURISDICTION

This Court's jurisdiction is claimed under 28 U.S.C. 1257 (3). The December 10, 1976 Order (A 23&24) of the New York State Supreme Court, Appellate Division of the Fourth Department affirmed the April 23, 1976 Decree (A 13-22) of Herkimer County Surrogate's Court. The aforesaid Order of the Appellate Division was mailed to the Petitioner on February 2, 1977. On February 28, 1977 Petitioner made timely motion to the New York State Court of Appeals for leave to Appeal which was denied by Order (A 25&26) of March 29, 1977,

thereby exhausting petitioner's N.Y.S. judicial review of the damages herein with the 14th Amendment question below on this page raised in all courts, which was raised for the first time at the court of first instance in objections to account with assumed Articials 3. Section 2, and 6 of the federal Constitution.

QUESTION PRESENTED

Whether a state Court that fails to compel a fiduciary under its supervision to make good lost purchasing power of funds under their control that could had been distributed to legatee before lost value and damages incurred for failure to distribute, violates the prohibited state conduct, equal protection and due process clauses of the 14th amendment of the federal Constitution, when predictable inflation runs over 10% and the cost to a

legatee to get a loan to have funds that could and should had been distributed to legatees for investment and/or enjoyment could run as much as 25%?

ISSUES

(1) Whether a bank executor taking around 2 years to move for settlement of account of a money estate of which part was self lent, is entitled to any fees and/or expenses as as executor, and should be surcharged damages to purchasing power of an estate due to delay in making distribution?

(2) Whether a legatee's failure to promptly move for accounting after 6 mos. after probate of a Will is constructive permission for an executor to retain control over estate funds, and/or is a bar to surcharge for loss do to delay in distribution of funds, when a legatee's move for

accounting has around 50% cost.

(3) Meinhard v Salmon, 249 N.Y. 458 punctilio of an honor, and City Bank v Cannon, 349 NYS2d 870 divided loyalty.

STATEMENT OF THE CASE

The proceedings of the case is for Judicial Settlement of executor's account, for results to distribute total funds to residuary legatees. Objections to account are: (a) Lost purchasing power of funds thru failure to make distribution of funds that executor self lent, (b) Payment of taxes of income with reduced purchasing power, (c) Administration expense should be based on funds of proper distribution, (d) Accounting & commissions should be denied because of delayed distribution of funds self lent, (e) Accounting not index to 1/1/1974, (g) Accounting fails to assign all claim of the estate to petitioner

for the use of legatees, (f) 25% interest surcharge per yr. until distribution for lost investment & enjoyment opportunities.

REASON TO GRANT WRIT

To establish actual remedy not governed by the doctrine of waste, against the long standing practice of surrogate courts permitting executors (banks) and lawyers working over estates to their interest which causes delay in distribution of an estate to the damage of the legatee's joy and purchasing power.

CONCLUSION

For that reason, a writ of certiorary should issue to review the Order, to the N.Y.S. Supreme Court Appellate Division, Fourth Department.

Submitted,

DONALD SCHANBARGER

June 1, 1977

Petitioner Pro Se

SURROGATE'S COURT - HERKIMER COUNTY

-----X
In the matter of the Judicial Settlement

of the account of Marine Midland Bank-

Central as Executor of the Estate of

HARRIET I. HENDRY,

a/k/a Harriet E. Hendry,

Deceased.

-----X
SCHNEIDER, S.:

Objections to the account of the Marine Bank-Central, as Executor of the Estate of the above named decedent, were filed by Donald Schanbarger, one of the residuary legatees under the Last Will and Testament of the above named testator. Upon the return date of the citation said Donald Schanbarger appealed in person and was advised by the Court of the provisions of SCPA 2211, and offered to adjourn the proceedings should he desire to examine the fiduciary under oath in reference to its

account and the objections thereto filed by him. The objectant stated he did not wish to examine the fiduciary nor did he desire an adjournment, and stated he wished to proceed and to be given an opportunity to be heard in reference to the objections he had filed, whereupon the Court permitted him to proceed with his argument. In so doing the Court requested that he discuss each objection separately and in the order set forth in the objections.

In reply to objection "A", the attorney for the fiduciary stated that he believed the decedent did own an interest in some real property which was of very little value. The objectant then stated he really was not interested in the real property objection and that he would go ahead with the other objections. The Court, however, instructed the fiduciary's attorney

to file an answer in reference to the interest of the testator in any real property. Such an answer was filed, which shows that the testator's husband, at the time of his death, owned a lot in the Town of Forestport, appraised for the sum of two hundred fifty dollars. It further appears that the testator's husband's distributees were a son by a previous marriage and the testator herein. The whereabouts of the son is unknown. The answer further points out that the cost of legal proceedings to permit the sale of said property would far exceed the amount for which the property could be sold.

The title to all real property of a decedent that has not been disposed of by Will vest immediately upon his death in his distributees, (Matter of Roberts, 414 N.Y. 369; Kingsland v. Murray, 133 N.Y.

170), subject, of course, to the rights of a fiduciary under EPTL 11-1.1. Accordingly, the real property which Delbert Hendry owned at the time of his death vested in his wife, the testator herein, and his son, approximately twentyeight years before the decedent's death. The property was not income producing and had the fiduciary herein exercised any control thereover, it could not have disposed of the same because of the outstanding interest therein in the decedent's husband's son. Not having exercised any control over the same nor received any income therefrom the fiduciary was not required to include the interest of the decedent in said real property in Schedule A of its account, since the title had already vested in those entitled thereto and there remained nothing for the fiduciary to do in

(170), subject of course, to the rights of a fiduciary under WFL 11-111. Accord- ingly, the real property which belongs to the estate of the decedent, the interest therein, the interest therein, and his son, approximately twenty years before the decedent's death. The property was not income producing and had the fiduciary therein exercised any control thereover, it could not have disposed of the same because of the outstanding debt set therein in the decedent's husband's son. Not having exercised any control over the same, not receiving any income therefrom the fiduciary was not required to include the income of the decedent in said real property in Schedule A of the account. Since the estate's assets were not in fact included in the account, it is not necessary for the fiduciary to be in

reference thereto. The objection to Schedule A of the fiduciary's account is therefore dismissed.

Objection "2" is based upon the pre- sumed loss of income by reason of said executor "self lending" the estate assets at a lower rate of interest than might be realized by investing the assets in Unit- ed States Treasury bills.

Schedule A of the account sets forth the estate assets received by the execu- tor. They consisted of two bank accounts and Series E U.S. Savings Bonds. Schedule A-2 of the account shows that the total income received was \$2411.47, representing an over-all earning of approximately eight percent, much greater than would have been received had the original assets been re- tained. The executor's reply to the ob- jections in reference to the Certificates

of Deposit in which the funds were invested states, "The interest rate during the period of time these funds were invested fluctuated in accordance with the investment market but during a period of time the interest rate yield was 11.45%."

EPTL 11-1.1(b)(3) empowers a fiduciary to invest and reinvest property of the estate "under the provisions of the Will . . . or as otherwise provided by law." The fiduciary's reply states that "part of the estate funds were invested in Certificates of Deposit of Marine Midland Bank - Central", and that such deposits were insured and paid the same interest rate as certificates in "other banks or financial institutions in the area," and were invested "together with other trust funds from other estates and fiduciary accounts. . . . and this gave a larger

yield on interest income than the ordinary investment."

The Courts have long recognized that "the advantages that are frequently to be secured by combining trust funds to make a large and more satisfactory investment than can be made of the funds of one trust without combination are of sufficient importance and value to the several trust funds to overcome any disadvantage that may arise from the fact that several owners of the investment may thereafter differ in the manner of handling the same. Trust funds have been from time to time combined for investment with satisfactory results and the practice is generally recognized as proper for a trustee. (11 Ruling Case Law, 143; Barry v. Lambert, 98 N.Y. 300)". (Above cited in Matter of Union Trust Co. (Hoffman Estate), 219 N.Y.

514, 518) (1916). It would appear that "self dealing" is condemned only when it is shown that it is improper or improvidently done resulting in a loss to those interested therein. (Matter of Bausch, 280 A.D. 432).

The burden of establishing dereliction of duty as a basis for a surcharge is on the objectant. (Re Weinberg's Will, (Sur) 69 N.Y.S. 2d 748). No evidence was presented that the rate of interest received by the executor from its investment of the estate assets was "at a lower rate than U.S. Treasury bills and does not maintain purchasing power of principle through inflation, when partial distribution to legatees for their investment or enjoyment should have issued." Schedule A-2, notwithstanding objectant's statement to the contrary, does, in fact represent the true

income received from the investment of the estate assets. The objectant's statement to the contrary is based upon pure speculation, conjecture and surmise.

The fiduciary, under the law, is not required to make partial distribution of the assets of the estate unless so directed by the testator's Will, or pursuant to order of the Court. SCPA 2102(5) gives to any beneficiary of an estate the right to commence a proceeding for the payment of "all or part of any testamentary provision." SCPA 2205 also gives to any person interested in an estate the right to bring a proceeding to require a fiduciary to file an intermediate or final account within such time and in such manner as directed by the Court. The objectant did not avail himself of either of those two rights, and should not now be permitted

to object to something he himself could had prevented or accomplished had he desired to under the above provisions of the law. Under the circumstances, number "2" of the objections is dismissed.

Objection "3" is in reference to payment of taxes on income when the estate lost purchasing power through foreseeable inflation during the stewardship of the said executor." The payment of taxes on income received by a fiduciary is mandatory under the law, and is a proper administration expense. The argument that the estate "lost purchasing power through foreseeable inflation" does not constitute a valid objection to the payment of income taxes on income received. Objection numbered "3" is dismissed.

The Court does not believe there is any merit to objection "4" and therefore dis-

misses the same.

In reference to objection "5", the objectant has failed to establish dereliction of duty or loss to the estate occasioned by any acts of the fiduciary. Again, the objectant has submitted no facts or proof, and bases his assertions warranting a surcharge upon an arbitrary interest rate selected by him and objections "1" through "4" discussed above. Objection "5" is, therefore, dismissed. The cases cited by the objectant have no application in the present situation.

The Court construes objection "6" as an attempt on the part of the objectant to obtain control of the estate assets in order to manipulate the same according to his whim and desire. He will, of course, be paid on this accounting the share of the estate which he is entitled to receive

misses the name.

In reference to objection "5", the ob-

jectant has failed to establish that the

will of the testator is not validly

executed by any one of the three

the objectant has submitted no proof

proof, and hence his assertions regarding

a signature upon an authentic document

are rejected by his own admission.

through "5" discussed above. Objection

"5" is, therefore, dismissed. The same

also applies to the objection raised by the

in the present situation.

The Court therefore rejects objection "5" as

an attempt to deprive the testator of

control of his estate. Objection "6"

order to establish the same, he has failed

to submit any proof. Objection "6" is

dismissed. The Court therefore rejects

the objection as it is not validly

under the testator's Will. The other residuary legatee also is entitled to and will receive the share which is due her under the testator's Will. Accordingly, no reason exists for the objectant's request. Also, there is no provision of law which would permit the Court to grant the objectant what he requests. Objection "6" is denied.

It is believed that the remaining objections are, in part, a reiteration of some of the preceding objections and need not be further discussed, except to say, the Court is of the opinion that neither the objectant nor the other residuary legatee have been denied any constitutional rights. Objections "7" and "9" are dismissed.

Dated, August 25, 1975.

/s/ Albert W. Schneider
Surrogate

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In the Matter of the Judicial Settlement
of the Account of Marine Midland Bank-
Central as Executor of the Estate of
HARRIET I. HENDRY a/k/a
Harriet E. Hendry,
deceased.

File No. 52093

MARINE MIDLAND BANK-CENTRAL, the Executor of the Estate of Harriet I. Hendry, late of the Village of Ilion, in Herkimer County, New York, deceased, having heretofore presented to this Court the account of the proceedings as such Executor together with its petition praying for a judicial settlement thereof, and process having been thereupon duly issued, pursuant to statute, directed to all persons interested in the estate of said deceased, requiring them to show cause before this Court at the Court House thereof on the

of the preceding as well as the
total presented in this report are correct

DEGREE A 14

28th day of July, 1975, at 10:00 o'clock in the forenoon of that day why the said account should not be judicially settled, and said proces having been returned with proof of service thereon on Evelyn R. Schanbarger and an admission of service of citation having been duly executed and filed on behalf of Donald Schanbarger, and the Executor having appeared by Jack Manley, of Carter & Manley, its counsel, and the said Evelyn R. Schanbarger having failed to appear in person or by counsel on the return day of said process, and the said Donald Schanbarger having appeared in person Pro Se on the return day of said process and having filed objections to said account, and the Court offered the objectant the opportunity to adjourn the proceedings in order to examine the fiduciary under oath in reference to the ac-

count and the objections filed thereto and the said objectant Donald Schanbarger in open Court thereupon waiving the right to examine the fiduciary and stating he did not desire an adjournment and desired to be heard concerning his objections, and the objectant Donald Schanbarger having thereupon heard by the Court upon his objections to the account, and the Court having directed the fiduciary to file an answer to the objections in reference to the interest of the testator in any real property and otherwise, and the matter having been adjourned until the 19th day of August, 1975, and the Executor having filed its reply to the objections duly sworn to August 11, 1975 and upon filing due proof of service upon the objectant Donald Schanbarger of the Executor's Reply to the objections, and upon the adjourned

date on the 19th day of August, 1975, the Executor having appeared by Jack Manley of Carter & Manley, counsel, and the objectant Donald Schanbarger not then appearing in person or by counsel, and the Court having made and filed its decision herein on August 25, 1975, finding that the objectant Donald Schanbarger has no valid objections to the account of the Executor filed herein and directing the dismissal of the objections filed by said objectant,

NOW, upon motion of Jack Manley, Esq., of Carter & Manley, counsel for the Executors, it is

ORDERED, ADJUDGED AND DECREED, that the objections filed by the said Donald Schanbarger, be and the same hereby are dismissed;

AND the Court, after having examined

the said account, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof, to-wit:

A SUMMARY STATEMENT of the account of Marine Midland Bank-Central as Executor of the estate of Harriet I. Hendry, deceased, made by the Court as judicially settled and allowed:

The said Executor is chargeable as follows:

With the amount of principal assets shown in Schedule A	\$19,435.18
With increase, as shown by Schedule A-1	None
With amount of income collected as shown by Schedule A-2	<u>2,411.27</u>
Total	\$21,847.08

The said Executor is credited as follows:

With the amount of Schedule B	None
With the amount of Schedule C	951.32
With the amount of Schedule C-1	942.00
With amount of Schedule D	6,023.82
With amount of Schedule E	300.00
With amount of Schedule F	None
Total	<u>8,217.14</u>

Leaving a balance in the Executor's hands of \$13,629.94

AND it appearing that said Executor has fully accounted for all the moneys and property of the estate of the above named deceased which have come into its hands as such Executor, and his account having been adjusted by this Court, and a summary statement of the same having been made as above to be recorded herewith and to be taken as part of this Decree;

AND, the said Executor having filed the receipt of the Treasurer of Herkimer Coun-

ty, sealed and countersigned by the State Tax Commission, for the sum of \$246.00, in the amount of estate tax which was found to be due from and assessed against the property or interest in property, passing or transferred from the estate of said deceased, it is further

ORDERED, ADJUDGED AND DECREED, that the said Executor, Marine Midland Bank-Central, be relieved from all liability, personal or otherwise, on account of such estate tax; and it is further

ORDERED, ADJUDGED AND DECREED, that the legacy of \$100.00 bequeathed by paragraph THIRD of the Will to Howard Schanbarger or in event he shall predecease the Testatrix to his distributees in accordance with the provisions of the Decedent's Estate Law, shall be distributed by the payment of the sum of Fifty Dollars (\$50.00) to Evelyn

R. Schanbarger, widow of the said Howard Schanbarger and Fifty (\$50.00) to Donald R. Schanbarger, son and only child of Howard Schanbarger; and it is further

ORDERED, ADJUDGED AND DECREED, - that said Executor retain the sum of \$873.88 for the commissions to which it is entitled, and it is further

ORDERED, ADJUDGED AND DECREED, that the sum of \$325.00 is hereby allowed to Carter & Manley, counsel for the said estate and Executor as part of the taxable costs and disbursements of the accounting proceeding herein which shall be paid by the Executor herein;

AND, it appearing that the balance in the hands of the Executor, and the expenses and allowances herein provided are recapitulated as follows:

Balance in the Executor's

hands \$13,629.94

LESS: Legacy to Evelyn

R. Schanbarger 50.00

Legacy to Donald

Schanbarger 50.00

Executor's Com-

missions 873.88

Allowance to

Carter & Manley 325.00

Total 1,298.88

Balance \$12,331.06

Leaving a balance in the hands of the Executor of \$12,331.06 for distribution; it is further

ORDERED, ADJUDGED AND DECREED, that the said Executor after making the deductions and payments aforesaid dispose of the balance of \$12,331.06 then remaining by paying to the following named persons the sums set opposite their respective

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names, which said sums are hereby judged to be the amounts due said persons respectively, on this accounting:

To Evelyn R. Schanbarger,
two-thirds of residue \$8,220.70

To Donald Schanbarger, one-
third of residue \$4,110.36

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that upon making the payments aforesaid and taking and filing receipts thereof, the said Marine Midland Bank-Central be and it hereby is released and discharged from all further liability and responsibility as such Executor and as to all matters embraced in this account and determined by this Decree.

ENTER

April 23, 1976

/s/ Albert W. Schneider
Albert W. Schneider

Surrogate

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DE-
PARTMENT

PRESENT: MARSH, P.J., MOULE, CARDAMONE,
SIMONS, GOLDMAN, JJ.

In the Matter of the Account of Marine
Midland Bank-Central as Executor of the
Estate of Harriet I. Hendry a/k/a Har-
riet E. Hendry, Deceased.

Donald Schanbarger, Appellant,

-vs-

Marine Midland Bank-Central (Executor),
Respondent.

Donald Schanbarger, a residuary legatee
in this proceeding, having appealed to
this Court from a Decree of the Surrogate's
Court of the County of Herkimer, made
and entered on April 23, 1976 and the said

AFFIRMANCE ORDER A 24

appeal having been submitted by Donald Schanbarger, the appellant, and by Jack Manley of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the Decree so appealed from be, and the same hereby is unanimously affirmed without costs for the reasons stated in the Memorandum of Herkimer County Court Surrogate's Court, Schneider, S.

Entered: December 10, 1976

/s/ Mary F. Zoller

MARY F. ZOLLER, Clerk

ORDER A 25

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at
Court of Appeals Hall in the City
of Albany on the twenty-ninth day
of March A.D. 1977

PRESENT, HON. CHARLES D. BREITEL, Chief
Judge, presiding.

4 Mo. No. 228

In the Matter of the Judicial Settlement
of the Account of Marine Midland Bank-
Central, as Executor &c. of Harriet I.
Hendry &c., Dec'd.

Donald Schanbarger,
Appellant,

vs.

Marine Midland Bank-Central (Executor),
Respondent.

A motion for leave to appeal to the
Court of Appeals in the above cause hav-

ORDER A 26

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at

Court of Appeals Hall in the City

of Albany on the twenty-first day

of March A.D. 1977

PRESENT, HON. CHARLES D. BRITTON, Chief

Justice, presiding.

A No. 228

In the Matter of the Judicial Election

of the County of Marine Midland Park

County, as Executor of the Estate of

Hendry & Co., Inc.

Donald H. Hahnberger,

Appellant,

vs.

Marine Midland Park-Central (Executor),

Respondent.

A motion for leave to appeal to the

Court of Appeals in the above cause has

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ing heretofore been made upon the part of
the appellant herein and papers having
been submitted thereon and due deliber-
ation having been thereupon had, it is

ORDERED, that the said motion be and
the same hereby is denied.

/s/ Joseph W. Bellacosa

Joseph W. Bellacosa

Clerk of the Court

AUG 22 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 77-197

DONALD SCHANBARGER,

Petitioner,

vs.

MARINE MIDLAND BANK-CENTRAL (Executor of
HARRIET HENDRY ESTATE),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK
STATE COURT OF APPEALS.

(Entitled by Petitioner as "Petition for a Writ of Cer-
tiorari to the New York State Supreme Court, Appel-
late Division of the Fourth Department")

BRIEF FOR RESPONDENT IN OPPOSITION.

JACK MANLEY

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IN THE
Supreme Court of the United States

October Term, 1976.

No. 77-197

DONALD SCHANBARGER,

Petitioner,

vs.

MARINE MIDLAND BANK-CENTRAL (Executor of Harriet
Hendry Estate),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK
STATE COURT OF APPEALS

(Entitled By Petitioner As "Petition For A Writ Of
Certiorari To The New York State Supreme Court,
Appellate Division Of The Fourth Department")

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion.

The only opinion was that delivered by Surrogate's Court, Herkimer County, State of New York—the court of original jurisdiction. It is not officially reported but is appended to the Petition for a Writ of Certiorari (Pages A 1 to A 12).

Jurisdiction.

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. 1257 (3).

Question Presented.

Petitioner's Statement of the Cases and Issues Presented require re-framing of the question presented to read as follows:

Where a corporate fiduciary brings on a proceeding for judicial settlement of its account as Executor of a Will and petitioner, as a legatee, under the Will and party to the proceeding, presents a list of objections to the account all of which, except one, present non-federal issues for determination by the State court and the one excepted objection presents a federal issue of claimed deprivation of petitioner's Federal constitutional rights and petitioner prevents the State Court from passing thereon by stating, in substance, that the objection is there for purposes of an appeal, is the State court judgment supported by adequate non-federal grounds so as to require denial of the application for a writ of certiorari?

Constitutional Provisions Involved.

United States Constitution, Fourteenth Amendment:

"Section I * * * ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

The statement of petitioner was prepared in disregard of the applicable principles of review that the federal questions sought to be reviewed were necessarily involved in the case; that they were properly presented to the State Court in accordance with State practice and lastly, whether the State Court judgment sought to be reviewed is supported by adequate nonfederal grounds.

Respondent, Marine Midland Bank-Central, was appointed Executor of the Will of testatrix on September 18, 1973. In June, 1975 the executor brought a proceeding to settle its final account. Petitioner was one of the three legatees cited to appear in the proceeding (R.A. 26-29.* Petitioner appeared and filed objections to the Account (R.A. 39-41). Nine grounds were stated as the basis of the objections. The eighth objection is the only one that might possibly be construed as presenting a federal question to Surrogate's Court. The precise language of the objection was as follows:

"8. Articials [sic] 3. Section 2. jurisdiction clause and 6. supremacy clause of the federal CONSTITUTION are assured [sic] with question of WHETHER A STATE COURT THAT FAILS TO COMPELL A FIDUCIARY UNDER ITS SUPERVISION TO MAKE GOOD LOST PURCHASING POWER OF FUNDS UNDER THEIR CONTROL THAT COULD HAD BEEN DISTRIBUTED TO LEGATEE BEFORE LOST VALUE AND DAMAGES INCURRED [sic] FOR FAILURE TO DISTRIBUTE, VIOLATES THE PROHIBITED STATE CONDUCT, EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE 14th AMENDMENT OF THE FEDERAL CONSTITUTION, WHEN PREDICTABLE INFLATION RUNS OVER 10% AND THE COST TO A LEGATEE TO GET A LOAN TO HAVE FUNDS THAT COULD AND SHOULD HAD BEEN DISTRIBUTED TO LEGATEES FOR INVESTMENT AND/OR ENJOYMENT COULD RUN AS MUCH AS 25%?"

*References are to pages in Record on Appeal, Appellate Division, Supreme Court, Fourth Department.

Upon the return date of the citation petitioner appeared without counsel and a dialogue ensued between the Court and petitioner a transcript of which is in the record (R.A. 1-19). The Surrogate then proceeded to discuss with petitioner each of the nine items in the objections to the account.

Significantly, when the court reached the heretofore set forth objection numbered eight petitioner summarily prevented any discussion thereof by stating "(Objection numbered) 8. Question for appeal" and passed to a discussion of the next objection—number 9 (R.A. 17).

It thus becomes clear that no federal constitutional question was before the Court and objection numbered eight had been interposed in the case by petitioner for in his words "question for appeal". Stated otherwise, petitioner apparently believed that if he made brief reference in his objections to some portion of the Federal Constitution this would suffice as the open sesame to this Court if he should be unsuccessful in the State courts.

In this, petitioner, of course, was mistaken for as we shall show, the federal question asserted must be necessarily involved in the case in the State Court, such question must be substantial and, alternatively, the State Court judgment sought to be reviewed may not be sustained on non-Federal grounds.

Returning to the record—the colloquy between the Court and petitioner shows that the latter was afforded every opportunity to furnish proof as to any of the objections but declined to do so. Eventually the matter was adjourned to give the Executor time to furnish additional information relating to objection numbered one—ownership of realty by testatrix (R.A. 18-19).

Thereafter the Executor submitted a detailed report thereon in the form of Executor's Reply to Objections (R.A. 42-46).

The Surrogate discussed the objections in an opinion that discussed in considerable detail the objections (R.A. 48-53). Petitioner appealed from the decree (R.A. 59) and on December 10, 1976 the Appellate Division, Fourth Department, unanimously affirmed the decree "for the reasons stated in the Memorandum" of Surrogate's Court.

Petitioner thereafter moved in the Court of Appeals for permission to appeal thereto from the Order of affirmance of the Appellate Division. In his affidavit in support thereof, petitioner routinely quoted the heretofore discussed objection numbered 8 and stated that the constitutional question had been "raised in all Courts". (Moving papers in Court of Appeals, pg. 4). On March 28, 1977 the Court of Appeals denied leave to appeal.

ARGUMENT.

A.

The Federal question asserted by petitioner is not presented by the record.

Newsome v. Smyth, 365 U.S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803;
Sutter v. Midland Valley R. Co., 280 U. S. 521, 50 S. Ct. 65, 74 L. Ed. 590;
Mellon v. McKinley, 275 U. S. 492, 48 S. Ct. 34, 72 L. Ed. 390;
Erie Railroad Co. v. Kirkendall, 266 U.S. 185, 45 S. Ct. 33, 69 L. Ed. 236.

These decisions support the well recognized principle that the grounds presented in a petition for certiorari must have a solid basis in the record and that the federal questions were necessarily involved in the case. The record herein demonstrates that such proof is absent therefrom.

Petitioner, apparently with knowledge that a federal issue could not be raised for the first time in this Court (*Tacon v. State of Arizona*, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346), carefully asserted the federal constitutional question in his list of objections but, as heretofore shown, rejected the attempt of the Surrogate to pass thereon and stated, in substance, that the objection was there for purposes of an appeal. The result is that not only was the federal question not properly presented for the State Court to pass thereon but the procedure is shown to have been a sham for the purpose of the present application.

B.

Assuming that a Federal Question was presented it was insubstantial.

Under the provisions of both Section 1257 (3) of the Judicial Code (28 U.S.C. §1257 [3]) and Rule 19 of the Supreme Court Rules, the authority of this court to review a state court judgment on certiorari depends on the existence of a substantial federal question. Moreover, Rule 19 indicates that regardless of whether the court below is a state court or a federal court there must be "special and important reasons" for granting a writ of certiorari.

These principles have been implemented not only in denying applications for writs but in dismissing writs as improvidently granted.

McClanahan v. Moraver & Hartzell, 404 U.S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136;
Palmieri v. State of Florida, 393 U.S. 218, 89 S. Ct. 440, 21 L. Ed. 2d 389;
Benz v. New York State Thruway Authority, 369 U.S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634;
Honeyman v. Hanan, 302 U.S. 375, 58 S. Ct. 273, 82 L. Ed. 312.

C.

The State Court judgment sought to be reviewed is supported by adequate non-federal grounds.

Where the decision of a State Court is based on both federal and non-federal grounds, there is no opportunity for review by this Court if the non-federal grounds are themselves adequate to support the judgment.

Harris v. Zion's Savings Bank & T. Co., 313 U.S. 541, 61 S. Ct. 840, 85 L. Ed. 1509;
Utilities Insurance Co. v. Potter, 312 U.S. 662, 61 S. Ct. 804, 85 L. Ed. 1109;
Johnson v. Thornburgh, 276 U.S. 601, 48 S. Ct. 322, 72 L. Ed. 725;
George O. Richardson Machinery Co. v. Scott, 276 U.S. 128, 48 S. Ct. 264, 72 L. Ed. 497.

There was presented herein to the State Court a routine application by an Executor for the judicial settlement of its account. Petitioner, as a legatee, appeared and filed objections to the account. The objections were carefully considered by the Surrogate. Petitioner was given an opportunity to submit proof but rejected the offer. The Executor submitted detailed proof in reply to the single objection that appeared to have prima facie merit. Thereafter, the Surrogate in a lengthy and carefully reasoned opinion dismissed all of the objections.

The Appellate Division, Fourth Department, on appeal, unanimously affirmed the decree and the Court of Appeals denied leave to appeal to that Court.

Petitioner has had his day in Court and the grant of a writ of certiorari herein would, in substance, present to this Court only the correctness of the judgment of the State Court based upon non-federal grounds.

CONCLUSION.

For the foregoing reasons, respondent says that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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